# ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

**MONDAY, NOVEMBER 3, 1919.**

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
*Washington, D. C.*

The subcommittee met, pursuant to the call of the chairman, in the room of the Committee on Appropriations, at 10.30 o'clock a. m., Senator Francis E. Warren presiding.

Present: Senators Warren (chairman), Lenroot, and Chamberlain.

## STATEMENT OF HON. NEWTON D. BAKER, SECRETARY OF WAR

Senator WARREN. Mr. Secretary, it is not necessary to explain to you what we have before us, because you understand that it is the matter of military justice. We have been getting considerable testimony in this matter, and we should be glad to have you make a statement to us in your own way.

Secretary BAKER. Senator, I feel that your hearings have been so exhaustive, and so many matters of record have been dealt with, and the records have all been put into the testimony, so that perhaps we would make more progress in getting any contribution that I can make if the members of the committee would ask me questions about any things that still remain unanswered in their minds. I have relied upon Gen. Crowder to present the records of the Department as far as any record is admissible, and I understand he has done so in a very voluminous and full way, and I scarcely know in what direction you desire to have me testify.

Senator WARREN. Senator Chamberlain, will you proceed with the Secretary?

Senator CHAMBERLAIN. Mr. Secretary, you have read over the proposed Articles of War—Senate bill 64, I believe it is called—written by Gen. Ansell, have you?

Secretary BAKER. Yes; quite casually, Senator.

Senator WARREN. Here is a comparative print of the present Articles of War, with that bill, in parallel columns.

Senator CHAMBERLAIN. The fact that that bill was introduced by me does not indicate that I approve of all the provisions in it. It was prepared by Gen. Ansell at the request of some members of the committee at the hearings had in February, 1919. There are some changes in the present Articles of War which are quite radical, and I am not prepared to agree with them in their entirety, but some of the features I would like to ask you about; namely, first, providing for some method of appeal other than now exists for a man convicted by court-martial.

Secretary BAKER. I have not had a great deal of time to follow, and I can not say that I have followed, with completeness, the hearings that have been had before this committee on that subject.

As I have observed the system of court-martial administration, or military justice administration, in the department, the chief defect of which I have been personally conscious was the inability of the final reviewing authority, which is the President, to quash a trial and order a trial de novo. A very large number of cases have been presented to me as the adviser of the President in the matter, in which apparently there was a dereliction of duty which ought to have been disciplined, and yet with a defect in the record of such a character as to make it quite impossible to administer discipline upon such a record, with the result that the proceeding had to be disapproved, and no further trial had. I think that is a mistake in any system of justice. I think there ought to be an opportunity for reversal on either the facts or the law, and a trial de novo.

I can illustrate what I mean by this. For instance, I do not want to deal with a case by name, but I will deal with the outstanding facts of a case. An officer was tried, and about a thousand pages of record taken. He was convicted by the court-martial of improper relations with a woman. The question as to whether he was guilty or not depended upon the continuance of a prior marriage of the woman, and that, in turn, depended upon the validity, *vel non*, of the divorce decree which she had sought from her previous husband; unless the husband from whom the divorce was sought had in fact died at the time of her marriage with the officer, in which case, of course, there would have been no necessity for the divorce. The record, although it contained a thousand pages of testimony, was silent on the question as to whether or not the previous husband was still living. We had the conflict of presumptions to deal with: First, the presumption of continued life in the previous husband; second, the presumption of innocence on the part of the officer; and as the officer at the time that he was supposed to be guilty of this wrong-doing had contracted another marriage, the presumption of innocence of the immediate offense with which he was charged involved a presumption of guilt of bigamy in order to clothe him with a presumption of innocence of the offense with which he was charged. I am a lawyer. I went over the case with very great care, personally, I had it inspected by a large number of lawyers, and every lawyer agreed that that record was fatally defective, and the officer was finally acquitted of any wrongdoing. In the meantime the husband whose continuance of life was the essential omission from the record was known by everybody to be walking about the streets in perfect disregard of any presumption. I think that is the kind of a case in which the power to reverse or modify or affirm is a very important power, and so far as my observation of it goes, or my reflection on the subject, the bill which I sent to Senator Chamberlain and to Mr. Dent in the year 1918, giving the President as Commander in Chief of the Army the right to reverse or modify, would have accomplished all that was necessary in that particular class of cases.

On the general question of a court of appeal I can only make observations without reaching a settled judgment. Obviously, nobody ought to object, and I think nobody would object, to an appellate tribunal that would pass upon these cases, if it were not for the fact that war is a very different state of affairs from peace. If you had an appellate tribunal functioning in the Army in peace times, its value, I think, would go without saying. No harm could come to

anybody by reason of the delay that would come by reason of having the appeal sought. The French have that; but when the emergency of war comes, the President of the French Republic, by decree, suspends the functions of the appellate power, as I understand it. I think that is open to at least these objections: First, that it warns the soldier that the bars are down, so that he feels, inevitably, that some safeguard which is thrown around him in time of peace is stricken away from him in time of war, that I think must have a bad effect on the soldier.

In the second place, I think it is notice to the officers that they are no longer restrained by the normal peace time restraints; and so I am fearful that having a procedure which may be conceded to be wise in time of peace, but which is stricken down in time of war, would have the double effect of making the soldiers feel that they were without a customary remedy, and making the officers feel the lack of the same responsibility which they feel in time of peace because they know their proceedings are going to be reviewed. As a matter of fact, and I speak now only from my personal observation, I have read literally hundreds of court-martial records, and my own experience as a lawyer has been upon the public side. I was city solicitor of Cleveland for a great many years, and as such solicitor had charge of the prosecutions in the city courts of Cleveland. Bringing that experience to the examination of these records, I am persuaded from such records as I have seen that the sense of responsibility on the part of the officers compares very favorably with the sense of responsibility that you find in civil courts anywhere. I think that the explanation of that lies in this, that officers know that they will not maintain discipline unless they have the respect of their men, and that the sort of respect which they must have must be based on reputation for being just in their treatment of their men. I think, looking over records that I have seen, and judging the processes by the opportunities of observation that I have had, that there is no disposition on the part of courts-martial to be either more summary in their judgment of the facts, or less careful in their application of the law, or more severe in their adjudication of penalties, than is customary in the ordinary criminal courts of the country.

Senator CHAMBERLAIN. Taking the case that you used by way of illustration a while ago, the particular officer in question was acquitted by the court-martial?

Secretary BAKER. No; he was convicted by the court-martial.

Senator CHAMBERALIN. And was the conviction sustained by the approving authority?

Secretary BAKER. The conviction was sustained by the convening authority.

Senator CHAMBERLAIN. Yes. That was the commanding officer?

Secretary BAKER. The commanding general; yes.

Senator CHAMBERLAIN. It was approved by him?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. Then the record came to the Office of the Judge Advocate General?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. Then what course was pursued?

Secretary BAKER. The Judge Advocate General reviewed the record and said that the proceedings were fatally defective, and I finally

adopted his view and recommended to the President that he disapprove the proceedings, as they involved dismissal and they had to come to the President; and the President disapproved the proceedings.

Senator CHAMBERLAIN. But there was no power in the Judge Advocate General or in the Secretary of War to pass upon the case and act, yourselves?

Secretary BAKER. There was not, and in my judgment ought not to be.

Senator CHAMBERLAIN. There is not in any of these cases, is there? You know the controversy, of course, between Gen. Ansell and others as to the interpretation of section 1199 of the Revised Statutes, Gen. Ansell on the one hand and on the other hand Gen. Crowder?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. Gen. Ansell claiming that under that section 1199, there is in the Secretary and the Judge Advocate General the power to modify or to practically reverse the sentence of a court-martial?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. Gen. Crowder, on the other hand, holding that his office has no power; that if the court had jurisdiction and if the trial was regular, no matter how many errors might have been committed, he has no power to reverse or modify it?

Secretary BAKER. Yes; I know that controversy.

Senator CHAMBERLAIN. You entertain the view of Gen. Crowder with reference to the power under that section of the Revised Statutes?

Secretary BAKER. Yes. Perhaps the committee would care to know just what took place in that particular instance.

Senator CHAMBERLAIN. In this case?

Secretary BAKER. No; in general on that statute.

Senator CHAMBERLAIN. Yes.

Secretary BAKER. Gen. Crowder was detailed to be Provost Marshal General, and at the time of his detail I rather reluctantly put him in charge of that work, because of my having come to rely very confidently upon his assistance and judgment as Judge Advocate General. He is one of the best lawyers I have ever been in contact with in a life of 25 years at the bar, and I rather reluctantly detailed him to the Provost Marshal General's Office, with the understanding that he would retain general supervision of the work of the Judge Advocate General's Office, and give it such attention as was necessary.

One day Gen. Ansell brought in to me, in my office, the first of his briefs on section 1199, and asked me to read it personally; said that it was on what he thought was a very important question, and one as to which I should express a personal judgment after I had read the whole argument. I read that brief two or three days after he brought it to me, and I then sent for Gen. Crowder. When the General came in I rather clumsily attempted a jesting or playful attitude with him. I said, "Gen. Crowder, how long have you been Judge Advocate General of the Army?" He told me the number of years. I said, "Is it possible that you have been Judge Advocate General for as many years as that, and have not discovered that there is a statute which gives the Judge Advocate General the power to reverse and modify court-martial proceedings?" The General took the question

very seriously, and said that he did not think that that was a possible situation. I said, "Well, here is a brief which Gen. Ansell has handed me, and it is very persuasively written, for an interpretation of section 1199 of Revised Statutes which you have never called to my attention. I would like to have you take the brief, read it, and let me have your views." He took the brief, and subsequently handed me a written reply. That was sent to Gen. Ansell, as I recall, and he made a counter brief.

I examined the whole question then individually, personally going to the library of the Judge Advocate General's Office for my authorities, and decided the question. I decided that section 1199, by traditional interpretation, by settled construction, and by the decision of such courts as had passed upon it, did not have the meaning which Gen. Ansell ascribed to it. That decision, I feel quite certain, is unshakable so far as the legal question involved is concerned, and I appended to my decision a statement which I believe in very deeply, that in time of war the executive departments ought not to extend their powers by doubtful or new constructions of statutes which have a settled construction, but that a frank appeal to the legislature is the way to get new power, if new power is needed. I then instructed Gen. Crowder to prepare a bill which could be sent to the military affairs committees of the Senate and the House, which would give such additional power as might be necessary to correct these records. That bill was drawn, and I sent it to Senator Chamberlain and to Mr. Dent, with a letter urging its immediate consideration. The bill never was considered, of course, but that was the end of that dispute so far as I had anything to do with it.

Senator CHAMBERLAIN. The House took some evidence on it.

Secretary BAKER. Well, I did not recall that fact. It may be.

Senator CHAMBERLAIN. The Senate Committee on Military Affairs concluded not to act upon it. It was called to the attention of the committee. It was not ignored, but the committee declined to act. I do not know what discussions were had, but the theory of it was—at least my theory of the bill was—that it did not really afford any relief. It undertook to confer upon the President powers that he already had. The President, as the Commander in Chief of the Army, practically reversed the decision of the court below.

Secretary BAKER. No; he did not reverse it. He set it aside.

Senator CHAMBERLAIN. That is practically the same thing.

Secretary BAKER. No; I do not think it is practically the same thing. It would have left the Department without a remedy to have set it aside.

Senator CHAMBERLAIN. He set it aside because, as you say, the record was wholly insufficient to sustain such a conviction; or there was lack of record.

Secretary BAKER. In a vital matter.

Senator CHAMBERLAIN. So that the President in the same way set it aside.

Secretary BAKER. There never has been any question of the power of the President to disapprove a court-martial proceeding in the class of cases which reach him.

Senator CHAMBERLAIN. No.

Secretary BAKER. There never has been.

Senator CHAMBERLAIN. So that the bill which you sent to the House and the Senate in January, 1918, did not confer any additional authority on the President, unless it gave him the power—and that, in the last analysis, would be the power of the Secretary of War and the Judge Advocate General—to examine into and to review all of the cases where there had been improper convictions.

Secretary BAKER. That "unless" is a very large unless.

Senator CHAMBERLAIN. Yes; but he had that power before?

Secretary BAKER. No; I beg to differ from you, Senator. The President has always been conceded to have the power to disapprove the proceedings of a court-martial in certain classes of cases. Now, the bill which was sent and which did not receive the approval of the Congress speaks for itself. It is before the committee. It undertakes to give the President exactly the power which Gen. Ansell contended was in section 1199.

Senator CHAMBERLAIN. And in the Judge Advocate General's Department?

Secretary BAKER. And in the Judge Advocate General's Department.

Senator CHAMBERLAIN. Yes; so that, in the last analysis, that bill which you sent up and which is in the record, practically left the power with the Judge Advocate General, because the President himself could not examine these infinite details of convictions?

Secretary BAKER. Oh, obviously, that is true.

Senator CHAMBERLAIN. Do you think the appellate power ought to remain within the Military Establishment itself?

Secretary BAKER. Yes; within the Military Establishment, supervised by the civil authority, which is the President, and the Secretary of War for him.

Senator, I have looked back over the list of my predecessors, from the beginning of this Government, and I find that they have been men of the most exalted character.

Senator CHAMBERLAIN. Nobody questions that.

Secretary BAKER. I looked back over the list of my recent predecessors, Mr. Garrison, Mr. Stimson, Mr. Taft, Mr. Root, Gen. Wright, Gen. Dickinson, Mr. Lincoln, Mr. Stanton, and the country has no more illustrious names.

Senator CHAMBERLAIN. Nobody questions that, Mr. Secretary.

Secretary BAKER. I looked back over the list of the Presidents, and I found the same element of exalted character, and the same confidence on the part of the public; and I can not persuade myself that any power intrusted to men of that type is improperly intrusted.

Senator CHAMBERLAIN. There is no question about that, Mr. Secretary; but you know as a practical man, as well as I do, that it is a physical impossibility that the Secretary of War, with the numerous responsibilities that devolve upon him, should examine these cases in detail. Take your own case; it is a physical impossibility for you to examine and review minutely in detail all the cases that come up. He relies, and must rely, on his military advisers.

Secretary BAKER. Certainly.

Senator CHAMBERLAIN. So that you do not question the integrity of the Secretary of War when you raise a question as to his ability to do things which it is physically impossible for him to do.

Secretary BAKER. Of course you raise a question which is really beside the issue. What the Secretary of War does is to select a Judge Advocate General whom he knows, and he watches that Judge Advocate General just as he watches any other subordinate. He learns to know how far he can rely on his discretion, his judgment, his industry, his knowledge, his sense of fairness; and when he finds that he has a subordinate upon whom he can not rely as to all those qualities, he replaces him with somebody upon whom he can rely.

Senator CHAMBERLAIN. What can be the objection to an appellate tribunal, partially civilian, if you please, or all civilian, if you please, but in the last analysis, having their judgments subject to reversal by the President? What objection can there be to a civilian tribunal to consider cases?

Secretary BAKER. The objections are practical and theoretical. I do not know enough to express a very positive opinion about the military difficulties, and yet I do think I know enough to illustrate the embarrassments. For instance, if you have a civilian tribunal, it has to sit somewhere, like the Supreme Court sits in Washington. Now, in France this kind of a case arose. We had a poor, misguided soldier who, under the influence of drink, or under some other maddening influence, raped a 4-year old French child, killed her, and secreted her body in an ash barrel. She was living with her grandparents. The guilt was obvious, unquestioned; finally admitted. That man was tried by court-martial, and the record of the case shows that it was faithfully and well tried; and he was hanged. Now, if that man had been sent out of the French village where that occurred to Washington or to some other place in the United States pending an appeal to a tribunal sitting over here, if the record of that case had been sent to Washington and a long delay had taken place between the offense and the punishment, the very agitated state of mind of the French village in which that crime took place would have made it certain that all sorts of rumors as to the escape of that man from the consequences of his act would have been circulated universally, and it is very difficult to tell what relations would have been developed between our Army and the French people among whom the soldiers were billeted.

Senator CHAMBERLAIN. He was not brought before the local tribunal?

Secretary BAKER. No, sir.

Senator CHAMBERLAIN. You would not have to remove him from the *locus in quo?*

Secretary BAKER. No, but then you would have had this situation, that you would have had to have him in the *locus in quo* for several months, or remove him to another place of imprisonment, in which case rumor on the subject would have been circulated everywhere that he had been sequestered or carried off so as to escape the consesequences of his crime. What happened was that when that execution took place the word went all over France, spreading from those villagers everywhere, that our Army protected the civil population among whom they were stationed. While I do not believe in capital punishment, and while I have in public and in private opposed it as a matter of belief, I think that the effect of that execution was undoubtedly very powerful in reconciling the French civil population to the billeting of American soldiers in their villages.

Senator CHAMBERLAIN. Yes. That was an exceptional case, just as the cases of the four young men who were sentenced to be shot, in France, were exceptional cases. But there have been over 20,000 general court-martial cases and over 300,000 summary court cases.

Secretary BAKER. Yes.

Senator CHAMBERLAIN. In practically none of which cases was any such crime as that concerned.

Secretary BAKER. Unfortunately there have been a large number of crimes similar to that. But what I am illustrating by that is not the particular crime, but the fact that when you have the Army in the field in places remote from our own country, you must make this military code so that it will fit the circumstances wherever they happen to be. We have soldiers in Siberia now, we have had them in northern Russia, and we may have them in Silesia. We have had them in Italy, where there was an inflamed state of the public mind, and all sorts of difficulties of reconciliation and conciliation.

Senator CHAMBERLAIN. Do you think in those cases the authorities here should lose touch with those men?

Secretary BAKER. Not at all; but I think we ought to build a system which is adapted to the task which the Army has to perform.

Senator CHAMBERLAIN. You, then, would not oppose any civil appellate tribunal?

Secretary BAKER. I would not approve a tribunal which could conclude the President. I think we have, in effect, a civil tribunal now.

Senator CHAMBERLAIN. The President?

Secretary BAKER. No. I think the boards of review which are appointed in the office of the Judge Advocate General and are composed in part of civilians—who are wearing the uniform, it is true, but are civilians with the civilian point of view—and military men, and in time of peace military men.

Senator CHAMBERLAIN. What is their power?

Secretary BAKER. Their power is to advise the Secretary of War.

Senator CHAMBERLAIN. Yes; but that many regard as not a sufficient power.

Secretary BAKER. I believe it to be a sufficient power.

Senator CHAMBERLAIN. Of course, there is a difference of viewpoint. You may be right. That is the point we are trying to determine.

Secretary BAKER. I think it is a sufficient agency. My opinion is based upon two points: First, I have not found it to work badly; I think it works well. In the second place, if you have that agency in time of peace and are going to attempt to suspend it in time of war, as the French do, I think that the effect of such suspension on both soldiers and officers would be bad.

Senator CHAMBERLAIN. But here is the trouble we have. Here is a man convicted by general court-martial, we will say, in the United States, and the evidence may or may not have been sufficient, or there may have been prejudicial error at the trial of that man. There may have been things occurred at the trial which in a civil tribunal would have caused a reversal of that decision; yet the man is convicted. The approving authority approves the judgment. In other words, that man then becomes a convict; he is convicted.

The case comes here to the Judge Advocate General and is referred by him to one of these reviewing boards you speak of. All in the world that this board can do and all in the world that the Secretary

of War and the Judge Advocate General can do is to advise the exercising of clemency, or to advise a change in the judgment; but if the judgment is still maintained by the reviewing authority, the man is still a convict. There is no power to reverse for prejudicial error.

Secretary BAKER. I have no possible objection to the extension of the authority of the President so that it will reach down to reverse the authority of the convening authority if it conflicts with the Judge Advocate General. I believe that to make the Judge Advocate General superior in authority to the Commander in Chief is bad.

Senator CHAMBERLAIN. I will ask you this. You know. Are there not cases that are in the hands of the President that he has not been able to dispose of at all?

Secretary BAKER. Recently they have all been disposed of.

Senator CHAMBERLAIN. How long were they there?

Secretary BAKER. They were there for six or eight weeks.

Senator CHAMBERLAIN. Are there not some that have been there over a year?

Secretary BAKER. I do not remember that there are any that have been there that long.

Senator CHAMBERLAIN. I think, if you will examine into it, you will find there are some. We lag behind the British authorities on the matter of court-martial proceedings. We have the same Articles of War, practically, with reference to courts-martial, that Great Britain had 100 years ago. But Great Britain has gotten away from it, and their reviewing authority is practically a civilian, according to Col. Rigby.

Secretary BAKER. But he has only advisory powers.

Senator CHAMBERLAIN. But they practically do not differ from his views. The cases are very rare where they have departed from his views.

Secretary BAKER. They are relatively rare, but that is rather a tribute to the ability with which the trials are conducted than evidence of any authority on the part of the reviewing power.

Senator CHAMBERLAIN. Can you put into this record your objections to the authority of the Secretary of War with reference to this authority, whatever it is, below the President?

Secretary BAKER. I am perfectly willing to state them now. I believe that in time of emergency, concentration of command is entirely necessary for the discipline of the Army. I think that the Constitution recognizes that, by making the President Commander in Chief, and providing that discipline shall flow through the President to the Army. That is the first objection. The second is that I think, as Gen. Crowder gives me the figures, 88 per cent of the offenses tried by court-martial are military and not civil offenses, and that military men are better able to judge the facts and circumstances. They have more expert information as to what the significance of the facts is which are adduced in those trials, than civilians could possibly have. And in the third place, I am quite clear in my belief that any system built up for the Army ought to be adapted to the emergency uses of the Army as well as its peace-time needs, and that any necessity for an appellate tribunal remote from the field of action, with the consequent delay, is not adapted to the emergencies of actual, active field operations.

Senator CHAMBERLAIN. You feel that the judgments of courts-martial have been satisfactory and legal?

Secretary BAKER. That is, of course, a generalization that it would be dangerous to indulge. I do not think that any human agency works with invariable and unerring accuracy.

Senator CHAMBERLAIN. In the main they have been?

Secretary BAKER. In the main they have been.

Senator CHAMBERLAIN. What was the use of these reviewing boards, if in the main the court-martial system has worked satisfactorily?

Secretary BAKER. I think the reviewing boards have served a very useful purpose, in readjusting and equalizing—particularly readjusting—the punishment. When a war is going on and you are in the stress of actual operations, the need of discipline is a very strong and urgent command upon everybody's conscience who is at work. When peace is reestablished it is possible to take a very much more lenient view of the penalties which have been imposed under actual war conditions. The whole system of justice in the Army, as Gen. Crowder, I feel sure, must have explained to you, is not punitive and is not exemplary, but is corrective, and I think the handsomest thing about the Army is the effort that it has made at Leavenworth and Alcatraz and Jay to bring about the rehabilitation of men who have been convicted of minor derelictions.

Senator CHAMBERLAIN. I quite agree with you.

Secretary BAKER. Now, when the armistice came it was possible to readjust the penalties imposed and bring them into harmony with the normal action of the Army's system of justice. Those boards served a very useful purpose.

Senator CHAMBERLAIN. That is entirely at variance with the testimony of a number of officers here, with the Kernan report and the testimony of Gen. O'Ryan, all of whom have testified practically that the purpose of the system is to operate *in terrorem*; not to correct the faults of the men, but to set an example to others.

Secretary BAKER. I think that is natural and perhaps necessary while active operations are going on. I think the restraining influence during active operations is essential. Take those four death cases in France, which have been so much talked of, and so completely misunderstood.

Senator CHAMBERLAIN. I would be glad to have you give us an account of them.

Secretary BAKER. I would be very glad to. Take those four cases. The feeling on the part of Gen. Pershing, Gen. Bullard, and Gen. March was in no sense a savage feeling, a desire to bring about the execution of those young men; but each of those officers was acting under the most impelling sense of duty and of conscience. They had before them the experience of the Union armies in the Civil War, wherein, by reason of the leniency of President Lincoln, it was stated and believed by everybody that examined it, that very many more death sentences had ultimately to be executed because of the leniency of the President, which had broken down the discipline of the Army.

Senator CHAMBERLAIN. I would like to have you give the history of those cases as you understand it.

Secretary BAKER. I shall be glad to do so. Those four cases were brought into my office at one time, by Gen. March, among a large number of other papers. He said, in effect—I do not undertake to quote him exactly—"Mr. Secretary, here are the first death sentences from France. There are four of them, two for sleeping on outpost duty, and two for disobedience of orders. They were in Gen. Bullard's command. He was the convening authority, and he has recommended the execution of the death sentence in each of the cases. Gen. Pershing had the cases sent to his headquarters, and attached a very urgent recommendation to the department that the sentences should be carried out, in the interest of discipline. I have examined the cases, and I have attached my own recommendation that the sentences be carried out." I said, "Very well, General; leave them with me. I will examine them personally." I realized, of course, that being the first cases, they were important, and I undertook to examine the records.

A day or so later Gen. Crowder came in to see me, and he told me that he had agreed formally with the recommendation as to the execution of those sentences; that the records were legally sufficient; but that he was troubled about the question as to whether clemency ought not to be exercised. I said, "The cases are with me, Gen. Crowder, and nothing will be done about them until I have given them personal study." At that time I had not studied them.

Once or twice later, I do not remember how often, Gen. Crowder came in. I do not remember whether I sent for him or he came voluntarily, but each time he came we discussed generally the question of clemency in the cases, and finally I, as I recall it, took them to my house, and read the records very carefully. I discovered, first, the extreme youth of these boys. They divided them into two classes; first, the boys who slept on outpost duty. The boys who slept on outpost duty were mere children. They had fallen asleep as they stood in the front trench. Apparently they were still standing at the place where they were supposed to be on duty. They had not gone off and sat down or lain down, but as they stood up against the parapet with their guns in their hands, their heads had just nodded over and they were asleep. This showed that they were completely exhausted, that there was no cessation or intentional withdrawal from duty, but that tired nature had just reached its limit. In each of those cases the officer, a sergeant, had gone up to the boy and taken his gun away from him, and then had him roused and had him come to get his gun. But the striking thing about it was that they had not gone off and sat down or lain down. Having been in the trenches myself I realized how impossible it was for a man to sleep in the day time, with the noise of exploding shells and all the confusion of battle around him. Such conditions made it impossible for a man to get his natural rest. I came to the conclusion that in those cases it was simply an impossible thing to take those boys out and shoot them.

The other two cases were cases of disobedience of orders. By a singular circumstance, it appeared, I think I myself discovered that they were both members of a company which had been trained by an officer who had objected to going to Europe to fight, on the ground that he was of German extraction, and that he could not fight

against his relatives. I may be telling you things that you already know.

Senator LENROOT. Was that the Henkes case?

Secretary BAKER. Yes. I discovered that those boys who disobeyed orders were trained in his company, and it seemed to me that boys of 18 or 19 years of age who had gotten their ideas of obedience from a captain who was himself in the state of mind that Henkes was in, could hardly have been held to have had as fair an opportunity to learn their obligations as if they had been under an officer who was not under that sort of stress. I sent for Gen. Crowder and called his attention to that fact, which up to that time, so far as I knew, he had not noted. He said he thought that was an important item. I did not disclose to Gen. Crowder or Gen. March or to anybody else what I proposed to do about those cases, but I studied them personally, and finally dictated and sent to the President a letter recommending that commutation should be had in all four cases.

Senator CHAMBERLAIN. I thought you said a while ago that you approved the sentences?

Secretary BAKER. I never said anything like that.

Senator LENROOT. He said Gen. March approved them.

Secretary BAKER. Gen. March formally approved.

Senator CHAMBERLAIN. I did not think that you had formally approved them, but——

Secretary BAKER. I never approved them for a minute; never had any idea of approving them; unless the circumstances turned out to be different from what I thought.

The fact is that the whole history of Mr. Lincoln's experience with the enforcement of the death penalty during the Civil War was familiar to me, and I had a general knowledge of the situation in foreign armies both in this and other wars.

These cases presented squarely an issue of the greatest gravity. When a man goes to sleep on outpost duty or refuses to obey a proper military order, he does not commit the same kind of offense as is involved in similar derelictions in civil life, or in the Army in peace times. A sleeping sentinel exposes his associates to terrible consequences, and if disobedience of orders is tolerated no one in a military command can know whether the things he is directed to do will be supported by the others to whom supporting orders are given, or whether he will be left bravely to obey and die while others disobey and cause his disaster. It was plainly necessary to use these first four cases in a way that would stir the Army and the men in it to a realization of their duty to one another and their duty to the country. As I thought the matter over, I came to the conclusion that in view of all the circumstances of these cases it would be possible for the President to commute the sentences, but to do it in an order which would inspire the Army with a fresh sense of devotion, and I therefore wrote to the President and at the same time wrote an order for his signature which, when published to the Army, would have the character of a direct message from the Commander in Chief, impressing every soldier with a new and earnest sense of responsibility.

Senator CHAMBERLAIN. Will you insert those letters in your testimony?

Secretary BAKER. They are in, somewhere; I do not happen to know where. If they are not, I shall be very glad to insert them.

(The letters referred to are as follows:)

WAR DEPARTMENT,
*Washington, May 1, 1918.*

MY DEAR MR. PRESIDENT: I present you herewith the court-martial proceedings in four cases occurring in the American Expeditionary Forces in France, each of which involves the imposition of the death penalty by shooting to death with musketry.

These cases have attracted widespread public interest, and with the papers are numerous letters and petitions urging clemency, most of which are of that spontaneous kind which are stirred by the natural aversion to the death penalty which humane people feel. Many of them are from mothers of soldiers whose general anxiety for the welfare of their sons is increased by apprehension lest exhaustion or thoughtlessness may lead their boys to weaknesses like those involved in these cases which the newspapers have described as trivial and involving no moral guilt, with the consequence that sons whose lives they are willing to forfeit in their country's defense may be ingloriously taken for disciplinary reasons in an excess of severity. Many of the letters are from serious and thoughtful men who argue that these cases do not involve disloyalty or conscious wrongdoing, and that whatever may have been the necessities of military discipline at other times and in other armies, the progress of a humane and intelligent civilization among us has advanced us beyond the helpful exercise of so stern a discipline in our Army in the present war.

I examined these cases personally, and had reached a conclusion with regard to the advice which I am herein giving before I had seen any of the letters or criticisms.

The record discloses the fact that the divisional commander, the commander in chief, Gen. Pershing, the Chief of Staff, Gen. March, and the Judge Advocate General concur in recommending the execution of the penalties imposed. The Judge Advocate General limits his concurrence to the technical statement that the proceedings in the cases are regular, and expressing regret that a more adequate conduct of the defense of the several men concerned was not provided, concurs in the recommendation of Gen. Pershing. As I find myself reaching an entirely different conclusion, and disagreeing with the entire and authoritative military opinion in case, I beg leave to set out at some length the reasons which move me in the matter.

The cases must be divided into two classes, and I will deal, first, with the two young men convicted of sleeping while on duty, namely, Pvt. Jeff Cook and Pvt. Forest D. Sebastian, both in Company G, Sixteenth Infantry.

These cases are substantially identical in their facts. The accusations were laid under the eighty-sixth article of war, which reads:

"Any sentinel who is found * * * sleeping upon his post * * * shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct."

In both cases a corporal inspecting along a front line trench found these young men standing in the proper military position, leaning against the trench, with their rifles lying on the parapet of the trench within easy reach of their hands. Each man had his head resting on his arm, and his arm resting on the parapet. The offenses were committed, in the Sebastian case on the night of November 3 and 4, and in the Cook case on or about the 5th of November. In both cases the testimony was exceedingly brief, and showed that the night was dark and cold, that the soldiers had their ponchos and other equipment on, and in one case it was a fair inference that the poncho was drawn over the ears and trench helmet in such a way as to make it difficult for the soldier to hear the approaching steps of the corporal. In each case the corporal laid his own rifle upon the parapet and took that of the soldier, carrying it away with him, and instructed the other sentinel, the men being posted in this outpost duty in twos, to shake the soldier and tell him to report to the corporal for his gun. In each case the corporal shamed the soldier for his neglect of duty, and pointed out to him the fact that not only his own life but those of others were at stake, and that he should be more zealous and alert. In neither case does either the corporal or the fellow-sentinel swear positively that the accused was asleep; I confess that on all reasonable grounds, taking the circumstances into consideration it seems to me entirely likely that both men were asleep; but it is important to note that in neither case had the accused stepped away from his proper military post to sit down or lie down; both being found standing at their post of duty in what is admitted to have been a correct military position, and if they were asleep their heads literally nodded over on to their arms without any intentional relaxation of attention to their duty so far as can be gathered from any of the surrounding circumstances.

These soldiers are both young. Sebastian enlisted into the Regular Army by volunteering on the 18th of April, 1917, having had no previous military experience, his age at that time being 19 years and 6 months. He was, therefore, slightly more than 20 at the time of the alleged offense. Cook enlisted on the 11th of May, 1917, without previous military experience, his age at that time being 18 years and 11 months. He was, therefore, at the time of the alleged offense, slightly under 20 years of age.

From the testimony, it appears that both of these young men had been posted as sentinels doing what is called double sentry duty, going on duty at 4 p. m., and remaining on duty until 6 a. m., with relief at intervals by other sentinels during the night, but with no opportunity to sleep during the night because of there being no place where they could secure sleep. It further appeared that neither of them had slept during the day before after having spent the previous night on gas sentinel duty, although both had tried to sleep during the day preceding the night of the alleged offenses but found it impossible because of the noise. In both cases the commanding officers of the soldiers who forwarded the charges and recommended trials by general courts-martial added to his endorsement as extenuating circumstances the youth and failure of the soldiers to take the necessary rest when off duty on the first occupation of trenches.

It is difficult to picture to the eye which has not seen it the situation in which these young soldiers were placed. In the month of November the section of France in which these soldiers were stationed was cold, wet and uncomfortable in the extreme. No sort of shelter of any comfortable kind could be provided near the trenches, because it attracts enemy observation and fire. Throughout one long night they performed duty as gas sentinels, during the next day, when they perhaps ought to have sought more rest than they did seek, they found it difficult to secure any sleep because of the noise and discomfort of their surroundings. As a consequence on the night of the alleged offenses they had reached the place at which exhausted nature apparently refused to go further, and without any intentional relaxation of vigilance on their parts they dozed in standing positions at their posts of duty.

I am quite aware of the gravity of this offense, and of the fact that the safety of others, perhaps the safety of an army and of a cause, may depend upon such disciplinary enforcement of this regulation as will prevent soldiers from sleeping on sentinel duty; and yet I cannot believe that youths of so little military experience, placed for the first time under circumstances so exhausting can be held to deserve the death penalty, nor can I believe that discipline of the death sentence ought to be imposed in cases which do not involve a bad heart, or so flagrant a disregard of the welfare of others, and of the obligation of a soldier as to be evidence of conscious disloyalty.

In both of these cases the reviewing judge advocate quotes with approval some observations of Gen. Upton who in his work on military policy points out that action taken by President Lincoln in the early days of the Civil War pardoning or commuting sentences in cases of death penalty led to the need of greater severity at a later period in the interest of discipline; but the cases which Gen. Upton had in mind were cases of desertion in the face of the enemy involving cowardice, and cases of substantially treasonable betrayal of the nation, and I can see no persuasion in them as an example. Rather it would seem to indicate that the invocation of this opinion of Gen. Upton indicates a feeling on the part of the reviewing judge advocate that while these particular cases might not be deemed on their own merits to justify the death sentence, that, nevertheless, as a disciplinary example such action would be justified. I am not, of course, suggesting that any of the military officers who have reviewed these cases would be willing to sacrifice the lives of these soldiers even though innocent; but I do think that if these cases stood alone no one of the reviewing officers would have recommended the execution of these sentences; their recommendations being, in my judgment, soldierly and in accordance with the traditions of their profession, and based upon a very earnest desire on their part to save the safety of their commands, and the lives of other soldiers; but, nevertheless, to some extent influenced by the value to the discipline of the army of the examples which their execution would afford.

I have not sought to examine the learning of this subject, and, therefore, have not prepared a history of the death penalty as a military punishment; but I think it fair to assume that it arose in times and under circumstances quite different from these, when men were impressed into armies to fight for causes in which they had little interest and of which they had little knowledge, and where their conduct was controlled without their consent by those who assumed to have more or less arbitrary power over them. Our Army, however, is the army of a democratic Nation fighting for a cause which the people themselves understand and approve, and I had happy and abundant evidence when I was in France that the plain soldiers of our expeditionary forces are aware of the fact that they are really defending principles in which

they have as direct an interest as anybody, principles which they understand, approve, and are willing to die for.

I venture, therefore, to believe that the President can with perfect safety to military discipline pardon these two young men; and I have prepared and attached hereto an order which, if it meets with your approval, will accomplish that purpose, and at the same time, I believe, upon its publication further stimulate the already fine spirit of our Army in France. Such an order as I have here drawn would be read by every soldier in France and in the United States, and coming from the Commander in Chief would be a challenge to the performance of duty, quite as stimulating as any disciplinary terror proceeding from the execution of these sentences. In the meantime, public opinion in this country would, I believe, with practical unanimity approve such action on your part.

In the cases of Stanley G. Fishback and Olon Ledoyen, the charges are substantially identical in that each of them is accused under the sixty-fourth article of war of having "Willfully disobeyed any lawful command of his superior officer." The facts show that on the 3d day of January, 1918, these two young men in broad day light in the theater of war, at a place back of the actual line, were directed to bring their equipment and fall in for drill. Each refused, whereupon they were warned by the lieutenant who gave the order not to persist in their refusal on the ground that grave consequences would ensue. They were not warned that the penalty of disobedience was death; but were advised earnestly to comply. Both persisted in their refusal. Each gave as his reason for refusing that he had been drilled extensively the day before, that they had gotten cold, the weather being extremely severe, and that they had not yet recovered from the effects of that exposure.

Both pleaded guilty at the trial.

It is perfectly obvious that this order ought to have been obeyed. It was a proper military order, and it seems to me inconceivable that such obstinate refusal on so trivial a matter could have been made with any consciousness that the death penalty was the alternative. Nevertheless, the disobedience was willful, undisciplined, and inexcusable, and it ought to be punished with a suitable punishment.

The Judge Advocate General in reviewing these cases limits himself again to the technical correctness of the proceedings; but in a subsequent memorandum he called the attention of the Chief of Staff to the fact that four cases of sleeping on post arising in the same regiment at approximately the same time resulting in acquittal of the accused on substantially the same evidence as that recited in the Sebastian and Cook cases above reviewed, and that in six cases similar offenses committed elsewhere in France had led to very moderate penalties. The Judge Advocate General says in this memorandum:

"In addition to the foregoing, the study in this office reveals a number of cases which have come in from France where men have been convicted of willful disobedience of orders under circumstances which do not distinguish them as to the locus of the offense from the cases of Fishback and Ledoyen, who were sentenced to death. The sentences in the cases referred to run from a few months to several years' confinement."

In other words, the Judge Advocate General reviewing generally the state of discipline in the Army in France, and the steps taken to enforce it, reaches the conclusion that up to the time of the trial of these cases the offenses of which these soldiers were convicted had been regarded as quite minor in their gravity. The Chief of Staff in commenting upon this memorandum of the Judge Advocate General is able from his own recollection to add that the willful disobedience cases lately tried in France did not occur in the actual theater of war, making at least that much of a distinction. But the case still remains one in which suddenly a new and severe attitude is taken without the record disclosing that any special order had been made notifying soldiers that the requirements of discipline would call upon courts-martial thereafter to resort to extreme penalties to restore discipline.

Both Ledoyen and Fishback are young. The record shows that Ledoyen enlisted on the 3d of February, 1917, without previous military experience, his age at that time being 18 years and 1 month. Fishback enlisted on the 17th of February, 1917, without previous military experience, his age being 19 years and 2 months, Each of them at the time of the commission of the alleged offenses was, therefore, less than 20 years of age.

The record in the Fishback case shows that there had been previous shortcomings on his part in the matter of obedience. That is to say, he had once failed to report for drill for which he was required to forfeit 15 days' pay; a second time failed to report for drill, penalty not stated; and a third time failed to report for fatigue duty, for which he was sentenced to one month at hard labor and to forfeit two-thirds of his

pay for two months. He seems, therefore, to have found it difficult to accommodate himself to the discipline of the life of a soldier, and his offense hereunder reviewed is aggravated by this previous record.

By a very extraordinary coincidence this record discloses the fact that these two soldiers were members of a company commanded by Capt. D. A. Henckes. It is from the captain of his company that the soldier most immediately learns discipline and obedience. The captain sets the example, and inculcates the principles upon which the soldier is built. Now, this particular Capt. Henckes, although for many years an officer in the Regular Army, was himself so undisciplined and disloyal that when he was ordered to France with his command, he sought to resign because he did not want to fight the Germans. Born in this country, and for 20 years an officer in its Army, under sworn obligation to defend the United States against all her enemies, domestic and foreign, he still sought to resign; and when the resignation was not accepted, and he went to France, the commander in chief was obliged to return him to this country because of his improper attitude toward the military service, and his country's cause in this war. He was thereupon court-martialed, and is now serving a sentence of 25 years in the penitentiary for his lack of loyalty and lack of discipline.

I confess I do not see how any soldiers in his company could have been expected to learn the proper attitude toward the military service from such a commander. I do not suggest that the shortcomings of Capt. Henckes be made an excuse for their disobedience, but these mere youths can hardly be put to death under these circumstances, and I, therefore, recommend that the sentence in each case be commuted to one involving penal servitude under circumstances which will enable them by confinement in the Disciplinary Barracks at Fort Leavenworth to acquire under better conditions a wholesome attitude toward the duty of a soldier. Orders accompanying this letter are drawn for your approval which will carry out the recommendation here made.

In view of the fact that both Fishback and Ledoyen had been previously guilty of minor offenses as disclosed by the record the penalty suggested is three years' confinement.

Respectfully submitted.

NEWTON D. BAKER, *Secretary of War.*

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In the foregoing case of Pvt. Forest D. Sebastian, Company G, Sixteenth Infantry, sentence is confirmed.

In view of the youth of Pvt. Sebastian, and the fact that his offense seems to have been wholly free from disloyalty or conscious disregard of his duty, I hereby grant him a full and unconditional pardon, and direct that he report to his company for further military duty.

The needs of discipline in the Army with propriety impose grave penalties upon those who imperil the safety of their fellows, and endanger their country's cause by lack of vigilance, or by infractions of rules in which safety has been found to rest. I am persuaded, however, that this young man will take the restored opportunity of his forfeited life as a challenge to devoted service for the future, and that the soldiers of the Army of the United States in France will realize too keenly the high character of the cause for which they are fighting, and the confidence which their country reposes in them to permit the possibility of further danger from any similar shortcoming.

In the foregoing case of Pvt. Jeff Cook, Company G, Sixteenth Infantry, sentence is confirmed.

In view of the youth of Pvt. Cook, and the fact that his offense seems to have been wholly free from disloyalty or conscious disregard of his duty, I hereby grant him a full and unconditional pardon, and direct that he report to his company for further military duty.

The needs of discipline in the Army with propriety impose grave penalties upon those who imperil the safety of their fellows, and endanger their country's cause by lack of vigilance, or by infractions of rules in which safety has been found to rest. I am persuaded, however, that this young man will take the restored opportunity of his forfeited life as a challenge to devoted service for the future, and that the soldiers of the Army of the United States in France will realize too keenly the high character of the cause for which they are fighting, and the confidence which their country reposes in them to permit the possibility of further danger from any similar shortcoming.

In the foregoing case of Pvt. Olon Ledoyen, Company B, Sixteenth Infantry, sentence is confirmed; but commuted to three years' penal servitude at the Disciplinary Barracks at Fort Leavenworth, Kans.

In the foregoing case of Pvt. Stanley G. Fishback, Company B, Sixteenth Infantry, sentence is confirmed; but commuted to three years' penal servitude at the Disciplinary Barracks at Fort Leavenworth, Kans.

The WHITE HOUSE, May, 1918.

Secretary BAKER. The President wrote me a note soon after, thanking me for the attention with which I had scrutinized the cases, saying that he would be very glad to follow my advice about it. Now, that is the whole history of those cases. I never heard, until Gen. Ansell wrote a letter to some Member of the lower House of Congress, that he had had anything to do with that at all. Gen. Ansell's statement that it was necessary for him to bestir himself to prevent execution of those sentences has no basis whatever in fact. He may have bestirred himself, but my action was without the least knowledge of any opinion or action of his.

Senator CHAMBERLAIN. Do you know whether or not any Member of the House saw the President about these four cases before your letter to the President?

Secretary BAKER. I have no means of knowing that; but I know that the President never communicated to me that he had been seen by anybody about it, and the first talk I had with the President about it was when I sent him my recommendation of commutation.

Senator CHAMBERLAIN. In looking over those records, did it strike you that these young men—I think all four of them—had not had the proper defense interposed for them?

Secretary BAKER. The records legally are conclusive of the actual guilt of the four.

Senator CHAMBERLAIN. They are bound to be, because two of them, at least, plead guilty.

Secretary BAKER. I am not certain. I think all four of them did. Two of them did, at least.

Senator CHAMBERLAIN. So that the records are legally sufficient, but there was not submitted to the trial court the fact of the environment of these young men, and of their having been on duty for a long time, or the circumstances.

Secretary BAKER. Yes; it appeared in the record that they had been unable to sleep the night before, and the surroundings were all shown. Of course they were perfectly known to the court. The trial was at the front where knowledge of conditions was general.

Senator CHAMBERLAIN. Was it explained by counsel in these trials that with a plea of guilty they might be sentenced to death?

Secretary BAKER. I think so. If that was not so, it would have been a defect, because the law requires it.

Senator CHAMBERLAIN. Do you think they were old enough to understand the seriousness of the offense?

Secretary BAKER. Oh, yes; they were quite old enough for that.

Senator CHAMBERLAIN. The military authorities all recommended the execution of the sentence, officially?

Secretary BAKER. So far as I know, without exception.

Senator CHAMBERLAIN. There have been only about 25 executions over there, have there not, and here?

Secretary BAKER. There have been no executions for military offenses during this war.

Senator CHAMBERLAIN. None at all?

Secretary BAKER. None.

Senator CHAMBERLAIN. You wrote a letter to the President some time ago stating the subsequent history of two of these boys?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. One of them was killed in actual battle, and one of them was wounded. What became of the other two?

Secretary BAKER. The other two, the commutations were not complete commutations, as there was perfectly obvious disobedience of orders. In their case there was commutation to two or three years at Fort Leavenworth.

Senator CHAMBERLAIN. Do you know whether they are out now?

Secretary BAKER. I do not know whether they are still at Fort Leavenworth or whether they have been released.

Senator CHAMBERLAIN. One of those boys was killed in action and the other was wounded in one fight and recovered and went back and was wounded in a second action; so that they did possess that soldierly quality, notwithstanding their breach of duty?

Secretary BAKER. Undoubtedly.

Senator CHAMBERLAIN. Do you think it would be feasible or advisable for Congress to enact a law which would make one or two, or possibly a majority, of a court that in the last analysis would be subject to the Commander in Chief of the Army, to constitute an appellate tribunal to review these cases of general courts-martial, or possibly others, to ascertain whether or not there has been prejudicial errors and make their recommendations?

Secretary BAKER. Perfectly feasible.

Senator CHAMBERLAIN. What do you think would be the result?

Secretary BAKER. I do not think it would improve the present review.

Senator CHAMBERLAIN. If you had heard some of the testimony here—I do not know how much you know of it—you would have ascertained that, I think, the statement has been made by some one, and possibly by you, inferentially, that while Gen. Crowder's heart appealed against the execution of the sentences, he finally recommended it. Is there not a disposition upon the part of the military authorities to stand together on cases of that kind?

Secretary BAKER. I think not. I have never discovered it.

Senator, those death cases presented as difficult a question of discretion and judgment as any cases I have ever faced in my life. The whole history of the war was standing there to be looked at. Every man who has exercised clemency in cases like that has realized, and must realize, that when he does it he is possibly exposing large numbers of other people to very serious consequences.

Senator CHAMBERLAIN. Yes; that may be true; but I think there is a very distinguished Member of the Senate at this time who was caught sleeping at his post and his commanding officer took his gun away from him, but he was not sentenced to be hung.

Secretary BAKER. Yes; and that is a very happy and fortunate circumstance, and I have not the least idea that there was ever any untoward circumstance followed from it. I think of Lincoln with an aching heart. Mr. Lincoln, when he first began to deal with death sentences, could not sentence men to death who had fought in the

Army of the country, and after he had commuted a large number of those sentences, the number of desertions and of derelictions of duty was such as to imperil the safety of the Union Army, and he had finally to yield.

Senator CHAMBERLAIN. Yes; but Mr. Lincoln's kindness and tenderness with his men was not what the military authorities advised. That is what I am getting at. This is taking some of these cases absolutely out of the jurisdiction of the military authorities, where trial had been had and there were errors at the trial—prejudicial errors.

Secretary BAKER. I have already expressed my entire sympathy with your plan to make prejudicial error the basis for a reversal of the judgment by the President.

Senator CHAMBERLAIN. Do you think that if that proposed amendment of January, 1918, was embodied in the law, that is all the articles need to be amended?

Secretary BAKER. I would not say that. I think if that had been embodied in the law it would have given the President the power to reverse, modify, or affirm, and I think that would have accomplished the purpose which you now have in mind by a court of review.

Senator CHAMBERLAIN. What additional power would that have given to the President over the amount he has now—over what he exercises?

Secretary BAKER. It would have given him the power to reverse the findings and have a trial *de novo*.

Senator LENROOT. Do you feel quite clear on that?

Secretary BAKER. That is what I hope it would do. That is what I think it ought to do.

Senator LENROOT. I have it before me here. It is on page 108 of this record. I read from page 108, as follows:

> The President may * * * return any record through the reviewing authority to the court for reconsideration or correction.

That does not carry, to my mind, the idea of a new trial.

Secretary BAKER. Just above that it says:

> * * * the President shall have power to disapprove, vacate, or set aside any finding, in whole or in part, to modify, vacate, or set aside any sentence, in whole or in part, and to direct the execution of such part only of any sentence as has not been vacated or set aside.

Senator LENROOT. Now, just follow on there a little further.

Secretary BAKER (reading):

> The President may suspend the execution of sentences in such classes of cases as may be designated by him, until acted upon as herein provided, and may return any record through the reviewing authority to the court for reconsideration or correction.

Senator LENROOT. That does not imply trial of the case *de novo*.

Senator CHAMBERLAIN. Mr. Secretary, the possible wrong that might be perpetrated by the military authorities when no appeal is had, or there is no power on the part of the appellate tribunal to reverse or modify the judgment of the court below, was exemplified in the cases of those negroes who were convicted in Texas, was it not?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. In that case those men were sentenced to be executed and were excuted before the record of their conviction reached the War Department?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. And within 48 hours after conviction?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. That led the War Department to the adoption of General Order No. 7, did it not?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. But for that order which was issued, and which was suggested by the hardship in that particular case, these boys in France might have been executed without the record ever reaching Washington?

Secretary BAKER. That would not have been possible, since the commander in the field did not have authority to execute the death sentence for sleeping on post or disobedience of orders without referring the case to Washington. There are three classes of court-martial cases—first, those in which the President is the convening authority; second, those in which the President is the confirming authority; and third, those in which a commander subordinate to the President is the convening authority.

With regard to the first of these, no instance arose in this war. The second class includes all death and dismissal cases, except only death sentences in case of murder, rape, mutiny, desertion in time of war, and spying. In crimes of the latter class, the commanding general or department commander may execute the death sentence without reference to the President; but the four death sentences under consideration were not within the excepted classes and therefore were of necessity referred to the President as the confirming authority. The third class of cases above referred to, in which the commander subordinate to the President is the convening authority, represents 98 per cent of the cases. As to them the President has no function, except that where there is jurisdictional error he may set aside the whole proceedings.

General Order No. 7 directed the submission to the President of all death, dismissal, and dishonorable discharge cases, with certain exceptions in the actual theater of war. There was no defect of power to issue this order, though there may have been a defect of foresight.

Senator CHAMBERLAIN. Well, you say there was no defect of power?

Secretary BAKER. That there was no appeal. But General Order No. 7, of course, accomplished a complete remedy.

Senator CHAMBERLAIN. It suspended the execution until the reviewing authority here could look at the record?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. That was the substance of it?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. And the records of all death sentences reached here?

Secretary BAKER. All death sentences and dismissals.

Senator CHAMBERLAIN. That was not because of any action of any reviewing authority, but because of a general order issued by the War Department?

Secretary BAKER. It was a general order issued by the War Department on the recommendation of the Judge Aduocate General.

Senator CHAMBERLAIN. Why was that necessary?

Secretary BAKER. I do not know that I understand you.

Senator CHAMBERLAIN. Why was it necessary to issue that order? Why did you issue that order?

Secretary BAKER. In order to afford the reviewing authority opportunity to submit them to the Secretary of War.

Senator CHAMBERLAIN. Therefore probably the judgment of conviction in those Texas cases would have afforded opportunity for the reviewing authority to have the execution of those men in Texas sustained or revoked?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. Now, Mr. Secretary, if the purpose of the judgments of courts-martial was corrective only, as you have indicated, why have you found it proper or necessary to create these reviewing boards, and why have you found it necessary to exercise clemency in so many cases?

Secretary BAKER. Our Army, Senator Chamberlain, was made up of 4,000,000 men, of whom a very large number came from civil life, both men and officers. They had had little or no previous military experience, and they were under a very strong sense of the necessity of whipping the Army quickly into a highly efficient condition. The army they were creating was to meet the most highly trained and disciplined body of men in the world. As a consequence, the training our men received was intensively real; both officers and men felt that this was no idle practice or moot court exercise, and both in our training camps at home and in the training abroad men acted under the pressure of a great responsibility. They were preparing their organizations to function in battle and had no opportunity to give the long drawn-out demonstrations of the value of discipline which peace-time training affords, but in a very real sense felt obliged to assert and maintain a rigid discipline. As a result, many of the cases of dereliction of duty which under peace-time conditions would have been merely the basis of admonition and counsel were in fact made the basis of charges, and long-term sentences were imposed in order that they might impress upon the men who learned of them the necessity for discipline. In most of the cases in which such long-term sentences were imposed death sentences might have been imposed; but clearly this new army, judging itself and molding itself for its great task, sought to get its discipline by long-term prison sentences rather than by the frequent imposition of the death penalty.

The sentences imposed in this fashion throughout the Army varied very widely. In some organizations there were more emergency officers than in others. The circumstances under which particular derelictions of duty took place differed widely; no settled disciplinary policy had time to assert itself throughout so widespread and large a group of military units. The consequence was that these sentences represented a very unequal imposition of penalties and, undoubtedly, represented in many instances a variety of judgment which was in part due to inexperience and in part to the excitement and earnestness which knowledge of the character of this war instilled into all of those who were preparing to take their part in it.

Now, when the war was over, it was possible to survey the whole situation. There was no longer occasion to inspire other people with the fear of serious penalties, and so the boards of review undertook carefully to balance and equalize the judgment of the penalties which

had been imposed by the undisciplined army. I think the boards were absolutely necessary and that they have fully accomplished the purpose which it was necessary to have them accomplish.

Senator CHAMBERLAIN. Where did you find authority for the creation of those boards?

Secretary BAKER. The authority undoubtedly lies in the Judge Advocate General's power. In the last analysis, the boards have no power but to advise the Judge Advocate General, and the Judge Advocate General advises the Secretary of War. The boards are created simply in the ordinary organization of the Judge Advocate General's Office.

Senator CHAMBERLAIN. I do not disapprove of the exercise of clemency on behalf of these men now. I heartily approve of it. But I am wondering why it was necessary, if the judgments in the first instance were corrective merely.

Secretary BAKER. I think it would be wrong to say that the judgments were corrective merely. I did not mean to be so understood. What I said was that the theory of the Army administration of justice, the fundamental theory of it as evidenced by what happens when men are sent to Fort Leavenworth, is correction and not punishment. Now, undoubtedly, while this war was going on a great many very severe penalties were imposed of an exemplary character for the purpose of dissuading other people from doing the things that had brought these men into difficulties. That was undoubtedly true as to conscientious objectors; undoubtedly the court-martial sentences passed in the conscientious-objector cases were to make persons who might be disposed to take refuge in pretended conscientious objection feel that that was not a safe refuge.

Senator CHAMBERLAIN. Then, do you agree with Gen. O'Ryan that they were *in terrorem*?

Secretary BAKER. I think many of them were, while the war was on, and I think there was need for the example. But I think there was need, after the war, for the work of the reviewing boards.

Senator CHAMBERLAIN. Do you know how many are now in prison for military offenses?

Secretary BAKER. I do not know how many. Gen. Kreger gave that to you. He gave that in his testimony here.

Senator CHAMBERLAIN. You know Gen. Crowder promised when this thing came up in February that there would be a general jail delivery within 60 days.

Secretary BAKER. I did not know that he quite promised that. As I understood, he said that all the cases would have been reviewed within 60 days.

Senator CHAMBERLAIN. Yes; I think that is what he said.

Secretary BAKER. I did not know that he promised a general jail delivery.

Senator CHAMBERLAIN. He said in this February hearing, in answer to a question of Senator McKellar, as follows, on page 271 [reading]:

> Gen. CROWDER. Now, addressing myself to the elements of that briefly, I want to say that before 30 days I shall have 60 per cent, or may be 70 per cent, of these sentences remitted in their excessive portions; and within 60 days I hope to have the whole field cleared up, so that you need not consider the question of punishment. That is the order. They will be worked out very expeditiously. So there remains to be considered only this question of removing the stigma of conviction.

Now, we do not remove the stigma of conviction by any action of these boards.

Secretary BAKER. Yes; I think that is true.

Senator CHAMBERLAIN. So that a man may have been unjustly convicted and sentenced, and the action of this board does not remove that.

Secretary BAKER. I think you are confusing two things. Sentence to excessive punishment and unjust conviction are two entirely different things.

Senator CHAMBERLAIN. They are pretty closely associated.

Secretary BAKER. They are not even first cousins, as I see it. Where a man is unjustly convicted, this stigma of conviction does attach to him until he is either pardoned or the conviction is disapproved. But where a man is legally, properly found guilty and the judgment of the tribunal errs only in the quantity of the sentence imposed, clemency is a proper remedy.

Senator CHAMBERLAIN. That may be, but if all these sentences of these courts are correctly imposed, why should clemency be exercised at all?

Secretary BAKER. I do not contend that the sentences imposed upon these military prisoners were proper sentences to be served. Nobody ever supposed that they would be served.

Senator CHAMBERLAIN. I can not understand why anybody should understand that they would not be served, where the thing was approved by the military authorities.

Secretary BAKER. Everybody who knew the system of discipline in the Army knew by token of past experience, and by the settled practice in the Army, that a long-term sentence to Fort Leavenworth is an indeterminate sentence, and that its termination depends on the good behavior and corrigibility of the prisoner.

Senator CHAMBERLAIN. Do you know how many conscientious objectors there are still in prison?

Secretary BAKER. I do not know. Perhaps 70 or 80 of those that are classed as conscientious objectors; although that is an exceedingly misleading phrase. It includes the religious objector and the political objector, the anarchist and revolutionist. All are equally "conscientious objectors."

Senator CHAMBERLAIN. Clemency was exercised in behalf of how many?

Secretary BAKER. I have not the figures, but I think originally there were something over 500 men in prison who were generically grouped as conscientious objectors. Clemency was exercised in behalf of most of them, I think.

Senator CHAMBERLAIN. None of them performed any military service?

Secretary BAKER. Well, none of them performed military service; there may have been some of them that went into the disciplinary battalion afterwards, although I am not certain of that.

Senator CHAMBERLAIN. When they were released were they given the pay of soldiers from the time they were drafted into the service up to the time they were discharged?

Secretary BAKER. My impression is that the local judge advocate's office determined first that they were entitled to their pay, and many of them were paid; and a large number of them sent the checks back

to me to reimburse the Government, and the checks were turned over to the Treasury Department.

Senator LENROOT. Are they given a discharge?

Secretary BAKER. Some of them. It is a discharge that is not honorable or dishonorable. It is a peculiar discharge, certifying simply that the soldier is discharged from the Army and has performed no military service.

Senator CHAMBERLAIN. It is a yellow ticket?

Secretary BAKER. I do not know the color.

Senator CHAMBERLAIN. I believe that is all.

Senator LENROOT. Mr. Secretary, with reference to the present practice, are disapprovals made wherever prejudicial error is found by the reviewing authority?

Secretary BAKER. You mean in the action of the Secretary of War and the President?

Senator LENROOT. Beginning with the first reviewing authority—that is, the convening authority—is it the practice to set aside—or disapprove, rather—the findings wherever prejudicial error is found?

Secretary BAKER. Senator, I can not answer that. I can only say that I have inquired a number of times of Gen. Crowder and Gen. Kreger, and my best recollection is that in their judgment commanding officers, convening authorities, almost invariably follow the advice of the Judge Advocate General's Office. I think I have been told there were two or three instances of their adhering to their view when there was a difference of opinion, when their own departmental or division judge advocate was very strong, and they preferred to follow their own judge advocate. I think there were only two or three cases.

So far as my own action is concerned, my recollection of the figures is that there were 8 or 10 cases in which I declined to follow the Judge Advocate General's advice. It was not, however, upon questions of the existence of prejudicial error, but it was largely upon questions of clemency. I took the view in this war that a drunken officer was an intolerable thing; that so far as I was personally concerned, I could not take the responsibility of sending anybody else's son into battle under an officer who had so far forgotten the requirements of his place as to become drunk while an officer; and while, in civil life, I was perfectly willing to give a man a second chance on that failing, that where it involved the lives of other men I could not have some officer break down in the middle of the battle and be found drunk and his men leaderless, if he had previously shown his susceptibility to the weakness. So that in three or four cases where the Judge Advocate General's Office recommended that, although the proof of drunkenness was clear, it was a first offense and therefore a reprimand or something of that kind would be sufficient, I declined to agree with that and adhered to the finding of the court for that reason. I do not recall ever having disagreed with the Judge Advocate General's recommendation upon any other class of cases, although there may have been one or two.

Senator LENROOT. And wherever you, yourself, were of the opinion that prejudicial error existed, you recommended the disapproval of the finding?

Secretary BAKER. Oh, clearly.

Senator LENROOT. Did you apply the same rule to prejudicial error as would be applied in a civil court?

Secretary BAKER. So far as I know, the rule is identical.

Senator LENROOT. For instance, take a case of this kind—and I am not giving an actual case but merely a hypothetical case—of evidence being admitted of other offenses than that charged. The evidence aside from the testimony might in itself be sufficient to sustain the verdict, and yet that would be prejudicial error in a civil court. Would you so regard it in a case of this sort?

Secretary BAKER. I would follow the established rules on that question, which are that previous offenses which show a disposition to commit the particular offense are admissible.

Senator LENROOT. No; I did not mean that. I meant where it would be reversible error in a civil court.

Secretary BAKER. Oh, clearly.

Senator LENROOT. Now, with reference to this court of appeals——

Secretary BAKER. Senator, to amplify my answer to your question, I can say this, that every review which comes before me from the Judge Advocate General's Office of a conviction, contains an appeal to the law books. The Supreme Court of the United States and the Federal courts and the State courts are all cited on questions of evidence.

Senator LENROOT. Now, with relation to the establishment of this court of military appeal, aside from the question, if such a court is created, of how should it be created, there seem to be two principal objections that have been urged, and you have spoken of both of them this morning, I think; one of them, the dangers of delay in time of war; and secondly, which has been more emphasized by other witnesses, the seeming incongruity of a subordinate officer controlling the actions of his superiors.

With reference to the latter objection, I take it for granted that it is assumed that in the creation of such a court it would be clothed with the same powers that a reviewing authority now has in making that objection.

Secretary BAKER. I should think so.

Senator LENROOT. But if the jurisdiction of that reviewing authority was limited to passing upon questions of law—the ascertainment of prejudicial error—would that objection still hold?

Secretary BAKER. I think the objection would still hold. It does not seem to me to be very important, in time of peace. I can not imagine anybody having the slightest objection to it in time of peace.

Senator LENROOT. If an appeal were allowed direct from the court-martial to such a court, and the jurisdiction of the court limited to these questions of law, its duty being, if reversible or prejudicial error was found, to transmit the record to the convening authority for a new trial, or if such error was not found, to transmit the record to the confirming authority for further action, could there be any possible objection from the standpoint of controlling superior authority?

Secretary BAKER. None; and in time of peace it would be a most desirable arrangement.

Senator LENROOT. You would approve of that?

Secretary BAKER. Yes; I can see no objection to that. Of course I think we are a little misled by our talking of "civilians" and

"military men," because the people in the Judge Advocate General's Office are all civilians, as a matter of fact. There are very few of them who have had much military experience, and when we have appointed men in the Judge Advocate General's Office, the thing that my predecessors have always done, and I have always done, is to search among civilian lawyers until we found a man of satisfactory ability, with actual legal experience. We examine their qualifications very closely, and we get excellent material. The men in the Judge Advocate General's Office are a very high type of lawyers, both those temporarily in the service and those who are permanently there. I have been associating with lawyers all my life, and it has been a great inspiration to me to see the thoroughness and the lawyer-like way in which those men treat their profession.

Senator LENROOT. In reference to the constitution of such a court, if it were created, even though a majority were composed of military men of the Regular Establishment, if they were appointed for definite times, in the first place they would naturally be selected because of their special qualifications?

Secretary BAKER. Undoubtedly.

Senator LENROOT. And in the second place, their devoting their entire time for a given period would tend to make them specially qualified, would it not?

Secretary BAKER. Undoubtedly.

Senator LENROOT. So that even though a majority of the court was composed of military men, such a court would be much better qualified to pass upon those questions than the reviewing authority now—for instance, the convening authority?

Secretary BAKER. I think such a court, whether a committee of the Judge Advocate General's Office or another tribunal created by some other legislation, would undoubtedly bring to bear upon a record a higher degree of skill than can be looked for from convening authorities acting upon the record.

Senator LENROOT. You would say, would you not, Mr. Secretary, that unless pressing necessity exists for reposing authority in the President or somebody who may not be qualified to pass upon the law, or who, because of his other duties, finds it physically impossible for him to give his consideration to the cases individually, it would be very much better to place that authority in the hands of qualified persons, who would give that attention to it?

Secretary BAKER. Surely, Senator.

Senator LENROOT. And then, I understand you, that in time of peace, with the suggestion that I have made, not to interfere with the discretion of the reviewing or confirming authorities, but to confine it solely to passing upon questions of law, you would see no objection to such a court?

Secretary BAKER. None whatever.

Senator LENROOT. In time of war, for instance, with reference to the late war, if such an appellate tribunal could be created in the field of operations, would there be any objection then?

Secretary BAKER. None, that I can see.

Senator CHAMBERLAIN. That is so of the British system?

Secretary BAKER. I can see no possible objection. If I understood you correctly, it results in this, that in time of peace there would be the appellate tribunal which would review these records, and if

it found prejudical error, would send them back to the convening authorities and tell them to try the case over again.

Senator CHAMBERLAIN. Yes.

Secretary BAKER. But if they found nothing prejudicial there, it would send it up to the confirming authority with a recommendation for the confirmation.

Senator CHAMBERLAIN. Yes; and the court itself exercise no discretion whatever.

Secretary BAKER. Yes, and in the field operations a similar body to that, organized to deal in a similar way.

Senator CHAMBERLAIN. Yes.

Secretary BAKER. I can see no objection to that at all.

Senator CHAMBERLAIN. Mr. Secretary, speaking of the point that was made by Senator Lenroot with reference to civilian lawyers who are temporarily commissioned in the Judge Advocate General's Office, while I am in accord with your view that they are high-class men, yet have you not found, as a matter of fact, in your experience as Secretary of War, that wherever a civilian dons a uniform, he stands more or less in awe, or rather more or less in the attitude of a military inferior, of those who are above him, and does not frequently exercise his own judgment in the matters which come before him?

Secretary BAKER. No; I have not discovered that, Senator.

Senator CHAMBERLAIN. Well, I have.

Secretary BAKER. I think my experience is larger than yours, Senator. I think that no tribute to the officers of the Army would be too great which explained and made known the independence of judgment, the integrity of conscience, which they exhibit toward their duty.

Senator CHAMBERLAIN. We have had civilians in uniform come before committees of the Senate and express regret that they had ever put on the uniform; and in undertaking to discharge the duties which come to them they are bound more or less by military etiquette. They can not help it.

Secretary BAKER. Senator, I get every day of my life papers which originate in an inquiry in the War Department, and they will start with a second lieutenant and go up to the Chief of Staff, and I find complete independence of judgment in the indorsements that are put upon those papers by military men.

Senator CHAMBERLAIN. You may be right about it. I doubt if you have had more experience than I.

Secretary BAKER. I am not disposed to deny that there are, every once in a while, flunkies in the Army. There are in every place.

Senator CHAMBERLAIN. It is not flunkies in uniform that I am talking of, but men in your own office have been demoted in the service for disagreement with their superiors in the service.

Secretary BAKER. I do not happen to remember any such cases.

Senator CHAMBERLAIN. How about Gen. Kenly?

Secretary BAKER. I do not think that he was demoted for being in disagreement with his superiors.

Senator CHAMBERLAIN. A very short time elapsed in his case, after he came up and told about the aviation section, before he was disciplined.

Secretary BAKER. I feel quite sure that no discipline was inflicted upon Gen. Kenly.

Senator CHAMBERLAIN. Then look what happened to Ansell.

Secretary BAKER. Well, what happened to Ansell?

Senator CHAMBERLAIN. He was practically taken out of that office which he occupied, the Judge Advocate General's Office.

Secretary BAKER. Yes; all right.

Senator CHAMBERLAIN. I am speaking of what happened to him because he disagreed with his superiors.

Secretary BAKER. He not only disagreed with his superiors, but he slandered his superiors, and he was generally—well, it is almost impossible to describe the state of mind into which Gen. Ansell had gotten.

Senator CHAMBERLAIN. I do not think that the record here will show that he slandered his superiors. What became of Gen. McCain, who, in the performance of his functions in The Adjutant General's Office, differed with the Chief of Staff?

Secretary BAKER. I never knew that Gen. McCain differed with the Chief of Staff on any official matter. I will be glad to put into this record what happened to him. Gen. McCain was the first officer I came in contact with when I came to Washington. I admired him, and I admire him now. He is a soldier, every inch of him; and I gave Gen. McCain the reward that the soldier's heart delights in. I took him out of an office in the department and put him at the head of a division to go to France to fight. How that can be regarded as punitive action, I can not understand.

Senator CHAMBERLAIN. Did he ask it?

Secretary BAKER. No.

Senator CHAMBERLAIN. I think he did not. I think that Gen. McCain thought that he could serve his country better in The Adjutant General's Office. He was for maintaining the *status quo* in The Adjutant General's Office. He was in conflict with the Chief of Staff.

Secretary BAKER. I never knew that he was. Gen McCain was a vigorous, capable officer, and as such was selected to go to France when that was the highest reward in the gift of the Secretary of War. Men have wept in my office for the chance, and I gave it to Gen. McCain.

Senator CHAMBERLAIN. Did Gen. McCain ask it?

Secretary BAKER. No; Gen. McCain was a soldier. He did his duty where he was put.

Senator CHAMBERLAIN. He never had any experience out of The Adjutant General's Office? He was there for many years, was he not?

Secretary BAKER. At the time I put him in command of a division, I was under the impression that he had had experience in the command of troops. It seems that I was misinformed as to that. I thought Gen. McCain had led a regiment in the Philippines with conspicuous gallantry, and I had the idea that here was a fine soldier that ought not to be kept here doing bureau work when the rewards of his profession lay with the Army in the field.

Senator CHAMBERLAIN. Had he been in the field?

Secretary BAKER. I do not know.

Senator CHAMBERLAIN. He had had more to do with the service of The Adjutant General's Office, had he not?

Secretary BAKER. I do not know. But my idea, as I said, was that he had that record of service in the field.

Senator CHAMBERLAIN. You knew that he had been for many years in The Adjutant General's Department?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. And he was a young officer when first assigned there? Who recommended him for that service in the field? He did not ask it?

Secretary BAKER. I selected him, personally.

Senator CHAMBERLAIN. You do not know that he was insisting upon maintaining the authority of The Adjutant General's Department and that he separated measurably from the Chief of Staff?

Secretary BAKER. No.

Senator CHAMBERLAIN. I wish you had found that out.

Secretary BAKER. I knew, of course, that there were constant questions of jurisdiction arising among all the bureaus there; but that there was any disagreement, any conflict of authority, between Gen. McCain and Gen. March, I never heard until now.

Senator CHAMBERLAIN. I just cite those instances to show the justice of my contention that where an inferior officer separates in his views from his chief, he is very apt to feel the ax.

Secretary BAKER. That is not the fact, Senator.

Senator CHAMBERLAIN. Well, I am convinced that it is.

Secretary BAKER. What is the fact is this, that officers of the Army come down here and testify before the Committees on Military Affairs of the Senate and of the House, and then anything that happens to them, no matter what, is regarded as punitive and disciplinary.

Senator CHAMBERLAIN. Of course you can always say that it is not punitive.

Secretary BAKER. You can not run the Army on the fact that if a man comes down here and testifies before a military committee, he is removed from the control of his superiors. The Army can not be run that way.

Senator CHAMBERLAIN. What happened to Col. Weeks?

Secretary BAKER. Col. Weeks was sent down to be department judge advocate of the Department of the Southeast on the recommendation of Gen. Kreger, because he was not in harmony in the operation of that office.

Senator CHAMBERLAIN. That is exactly what I am trying to call your attention to now; where the inferior officer is not in harmony with his chief, he goes out, somewhere.

Secretary BAKER. Yes; of course; and he ought to.

Senator CHAMBERLAIN. That is what I am trying to get at.

Secretary BAKER. Of course, he ought to.

Senator CHAMBERLAIN. He does, anyway,

Secretary BAKER. That is fortunate. You can not run an office with everybody running it in opposite directions.

Senator CHAMBERLAIN. But the chief always happens to be right.

Secretary BAKER. The chief must be right as long as he is chief. As soon as the chief goes wrong, you change the chief.

Senator CHAMBERLAIN. Have you ever changed a chief?

Secretary BAKER. Yes.

Senator CHAMBERLAIN. Where?

Secretary BAKER. I changed a chief when I put Gen. Kreger in charge of the Judge Advocate General's office.

Senator CHAMBERLAIN. That was a change on paper rather than in practice. Gen. Crowder is still Judge Advocate General.

Secretary BAKER. Yes; he is now. Gen. Kreger was the operating head for a while.

Senator CHAMBERLAIN. I believe that is all.

Senator LENROOT. I have nothing further.

Senator WARREN. Mr. Secretary, in Gen. Crowder's testimony he alluded to differences in statements made on the question of veracity as between himself and Gen. Ansell, and he spoke in a passing manner of that testimony regarding the Secretary of War. Do you want to allude to that testimony, to any of the statements made?

Secretary BAKER. Senator, I do not think I have any observations to make about it beyond this: Somewhere in his testimony—I do not know where it is, but somewhere in Gen. Ansell's testimony—there is a statement that the Secretary of War was inaccessible to Gen. Ansell. I want to enter the most positive and unequivocal contradiction to that statement. Gen. Ansell came into my office with as much freedom as my own secretary came in. He came when he wanted to come, and there never was a suggestion that the Secretary of War was inaccessible to Gen. Ansell.

Senator CHAMBERLAIN. I think probably that has been misapprehended a little bit. I think Gen. Ansell, when he was authorized by Gen. Crowder to reach you, reached you through military channels—through the Chief of Staff.

Secretary BAKER. The impression which Gen. Ansell's testimony gives—I know nothing about what he intended to say, but the impression that his testimony gives—is that it was necessary for him to reach me through military channels, and exactly the opposite is the truth. He came to me freely, and he came to me upon all sorts of occasions, and there is not in the records of the War Department a single recommendation of Gen. Ansell's looking to a better adjustment of the Judge Advocate General's office, which was ever presented by him and refused by me, with the solitary exception of the matter of section 1199 of the Revised Statutes, in which I did not agree with Gen. Ansell, and the recommendation that all of the court-martial cases that had been reviewed by Gen. Ansell—by the board of which he was president—should be reviewed over again because the work had not been properly done, which I did not believe. I do not happen to remember all the things that are in this record that Gen. Ansell said that could come within the scope of——

Senator WARREN. The committee has no interest in that, unless you want to take it up.

Secretary BAKER. I have no interest in it, but this is the feeling I had about it. A very serious controversy arose between Gen. Ansell and Gen. Crowder. Senator Chamberlain, of course, espoused Gen. Ansell's side of that controversy.

Senator CHAMBERLAIN. His view, rather.

Secretary BAKER. Yes; his view; and I think his side of the controversy.

Senator CHAMBERLAIN. Yes.

Secretary BAKER. The matter was spoken about in many forums where I had no opportunity to reply, where it was impossible for me to reply. I was Gen. Ansell's superior officer, and might be called

upon to be his judge. When Senator Chamberlain spoke upon the floor, of course I had no access to the floor. When he or Gen. Ansell made speeches in other places, or gave newspapers interviews, of course I had no opportunity to reply to those, because I had to remember that I might be called upon to judge Gen. Ansell's actions. What has seemed to me to be important in the whole matter is this, that if the controversy was one which was affecting prejudicially the administration of justice in the Army, then it would be necessary for me to act in the matter; and I accordingly referred the matter to the Inspector General of the Army, and you have his report, and you have the instructions that I gave him. I asked him to find out whether the disagreements and the controversy in the Judge Advocate General's Office were of a character that were affecting prejudicially the administration of justice or recommendations which ought to proceed from that office to me in the matter of clemency. Gen. Chamberlain went through the case carefully; his report is here, and it discloses that the administration of the office was not prejudiced by that controversy. It then seemed to me to be a matter that was largely indifferent.

Senator WARREN. Have you anything not touched upon by these questions that you wish to present for our consideration?

Secretary BAKER. Nothing at all, that I recall, unless there is something in the minds of the committee.

Senator WARREN. Have you anything further, Senator Lenroot?

Senator LENROOT. No.

Senator CHAMBERLAIN. I have nothing further.

(Secretary Baker subsequently submitted the following memorandum:)

The typewritten manuscript of this hearing was submitted to me through the courtesy of the chairman of the subcommittee, and I was invited to make any additions or corrections. I have read it carefully and find myself perplexed at the inconsistency between my answers to the questions of Senator Chamberlain and those of Senator Lenroot with regard to the creation of an appellate power. This inconsistency I can only explain by the feeling that in answering Senator Lenroot I had in my mind the same sort of a tribunal as suggested by Senator Chamberlain, which would function under the President as Commander in Chief of the Army. My mind at that time apparently was dealing with the cases which come to the President as the confirming authority, and my answers to Senator Lenroot's questions are therefore misleading, since he plainly had in mind the creation of an appellate tribunal which would function independently of the President on errors of law. It seems to me important that I should state clearly, if I can, the view I entertain on this subject of appellate power.

The President being the Commander in Chief of the Army, the supervisory control of discipline must of necessity rest in him and be exercised through such subordinate agencies in the Army as the exigencies of the situation from time to time require; and, in so far as discipline is enforceable by trial, through such tribunals as Congress shall from time to time establish. The institution of any extraneous and independent appellate power, interrupting the exercise of the full powers of the Commander in Chief, would inevitably weaken and might conceivably gravely imperil the authority of the President as the Commander in Chief and the commanding generals chosen by him in fields of action. The idea of an appellate power is wise, and our experience in this war shows its propriety. There should be no case of discipline in the Army beyond the reach of the Commander in Chief for correction. To accomplish this complete control boards of review, organized in the office of the Judge Advocate General, or, when the Army is operating in actual warfare, organized for independent commands, should have the power, under regulations prescribed by the President and, therefore, by his authority, to review court-martial proceedings and, upon the detection of errors of law, should have the right to return a record to the convening authority, pointing out the error of law and directing a retrial or disapproval of the proceedings.

and the restoration of the accused to his previous status. This should, however, be systematically organized under the direction of the President and at all times under his control and subject to general orders from the President which would lay down the policy to be followed under the law in the administration of discipline through the imposition of penalties.

The creation of a court of appeal with the power to substitute its judgment for that of the President as Commander in Chief, is, in my judgment, unnecessary and would be destructive in large measure of the single channel of command upon which efficient discipline in a military organization necessarily depends.

The emphasis laid in the discussion upon errors of law, as distinguished from errors of fact, seems to me to take too narrow a view both of the appellate power desirable and of the nature of court martial proceedings. The appellate power should be able to reach errors of fact as well as errors of law, and the President and those delegated by him under regulations to act in his behalf, should have the power to control these proceedings for errors of fact as well as mere technical errors of law. As a matter of fact, we have had in the War Department some controversy as to what is an error of law, and sometimes palpable errors of fact have been held to be errors of law in order that a remedy might be applied. We ought, therefore, not to prescribe a narrow technical rule, but a broad and generous power which will enable the President to supply a remedy when an error is discovered.

(Thereupon, at 12.15 o'clock p. m., the subcommittee adjourned, subject to the call of the chairman.)